United Nations A/CN.9/801

General Assembly

Distr.: General
4 April 2014

Original: English

**United Nations Commission on International Trade Law**
**Forty-seventh session**
New York, 7-25 July 2014

# Report of Working Group III (Online Dispute Resolution) on the work of its twenty-ninth session (New York, 24-28 March 2014)

## Contents


| | | *Paragraphs* | *Page* |
|---|---|---|---|
| I. | Introduction | 1-4 | 3 |
| II. | Organization of the session | 5-12 | 3 |
| III. | Deliberations and decisions | 13 | 5 |
| IV. | Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules | 14-167 | 5 |
| | A. General remarks | 14-33 | 5 |
| | B. Notes on draft procedural rules | 34-167 | 8 |
| | 1. Draft article 1 (Scope of application) | 34-46 | 8 |
| | 2. Draft article 2 (Definitions) | 47-59 | 9 |
| | 3. Draft article 3 (Communications) | 60-68 | 11 |
| | 4. Draft article 4A (Notice) | 69-83 | 12 |
| | 5. Draft article 4B (Response) | 84-85 | 13 |
| | 6. Draft article 4C (Counterclaim) | 86 | 14 |
| | 7. Draft article 5 (Negotiation) | 87-89 | 14 |
| | 8. Draft article 6 (Facilitated settlement) | 90-92 | 14 |
| | 9. Draft article 7 (Recommendation by a neutral) | 93-108 | 14 |


V.14-02192 (E) 140414 150414

Please recycle

10. Draft article 8 (Settlement) ..... 109 16
11. Draft article 9 (Appointment of neutral) ..... 110-118 17
12. Draft article 10 (Resignation or replacement of neutral) ..... 119 18
13. Draft article 11 (Power of neutral) ..... 120-132 18
14. Draft article 12 (ODR provider) ..... 133-137 19
15. Draft article 13 (Language of proceedings) ..... 138-157 20
16. Draft article 14 (Representation) ..... 158 22
17. Draft article 15 (Exclusion of liability) ..... 159-160 22
18. Draft article 16 (Costs) ..... 161-164 23
19. Other matters ..... 165-166 23

C. Other business ..... 167 23

# I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic commerce transactions, including B2B and B2C transactions.[1] The Commission decided inter alia at that session that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its forty-fifth session.[2]

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the mandate of the Working Group in respect of low-value, high-volume cross-border electronic commerce transactions, and the Working Group was encouraged to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, and to continue to conduct its work in the most efficient manner possible.[3] It was further agreed that the Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process; and that the Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations.[4] The Commission furthermore requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.[5] At its forty-sixth session, the Commission unanimously confirmed the decisions made at its forty-fifth session.[6]

4. The most recent compilation of historical references regarding the consideration by the Commission of the work of the Working Group can be found in document A/CN.9/WG.III/WP.126, paragraphs 5-15.

# II. Organization of the session

5. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-ninth session in New York, from 20 to 24 March 2014. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Brazil, Bulgaria, Canada,

[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.

[2] Ibid., para. 218.

[3] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.

[4] Ibid., para. 79.

[5] Ibid.

[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.

China, Colombia, Croatia, Germany, Greece, Hungary, India, Indonesia, Israel, Iran (Islamic Republic of), Japan, Mexico, Nigeria, Malaysia, Pakistan, Paraguay, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey and United States of America.

6. The session was also attended by observers from the following States: Czech Republic, Egypt, Libya, Malta, Netherlands, Romania, Saudi Arabia and United Arab Emirates.

7. The session was also attended by observers from the United Nations Office of Legal Affairs.

8. The session was also attended by observers from the following inter-governmental organizations: European Union (EU) and League of Arab States (LAS).

9. The session was also attended by observers from the following non-governmental organizations: American Arbitration Association (AAA), American Bar Association (ABA), Center for International Legal Education, University of Pittsburgh (CILE), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of International Commercial Law (IICL), Inter-American Commercial Arbitration Commission (IACAC), International Bar Association (IBA), Moot Alumni Association (MAA), National Centre for Technology and Dispute Resolution (NCTDR), New York State Bar Association (NYSBA), Penn State Dickinson School of Law, Queen Mary University of London School of International Arbitration and European Law Students' Association (ELSA).

10. The Working Group elected the following officers:

*Chairman*: Mr. Soogeun OH (Republic of Korea)

*Rapporteur*: Ms. Martha CARRILLO (Mexico)

11. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.126);

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.127 and Add.1); and

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft guidelines (A/CN.9/WG.III/WP.128).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of online dispute resolution for cross-border electronic commerce transactions: draft procedural rules.
5. Other business.

6. Adoption of the report.

# III. Deliberations and decisions

13. The Working Group resumed its work on agenda item 4 on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.127 and its addendum; A/CN.9/WG.III/WP.128). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. At the closing of its deliberations, the Working Group requested the Secretariat to prepare a revised draft of procedural rules on online dispute resolution (the "Rules") based on deliberations and decisions of the Working Group, and in that respect, to make the necessary drafting adjustments to ensure consistency of language in the text of the Rules.

# IV. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

## A. General remarks

14. The Working Group affirmed its wish to ensure that the work it was undertaking took into account current ODR practice and possible future developments. It was recalled that at its twenty-eighth session the Working Group acknowledged that the Rules, when complete, will proceed into a real world setting where they would be accepted, or not, by industry, including merchants and consumers, and that as such ought to be drafted in order to be usable, practical and acceptable in that setting. It was also said that it was important that the Rules could work in different legal environments, given that they are intended to be used in cross-border e-commerce transactions.

15. The Working Group also affirmed that due process, transparency, accountability and impartiality of the actors should form an integral part of the Rules being described.

*ODR provider, ODR platform and ODR administrator*

16. The Working Group considered the nature of existing online dispute resolution practices and whether the draft Rules' distinction between ODR providers and ODR platforms reflected that practice, and accommodated possible future permutations of ODR practice (see A/CN.9/WG.III/WP.127, paras. 10-13).

17. It was said that centralizing the concept by using the term "ODR administrator" would best capture existing practice as well as provide for flexibility in relation to the evolution of ODR systems.

18. A second suggestion was made to have a definition that addressed both an administrator and a platform, in order to ensure that all communications in the Rules took place via the platform.

19. Another suggestion was made to include different definitions for "ODR platform" and "ODR provider" on the basis that the underlying responsibilities and actions of the different entities ought to be transparent to users of the Rules. In

response it was said that decentralizing terms in that way was less technologically neutral than a single, flexible term that could accommodate technological developments. It was also said that defining an "ODR administrator" that was ultimately responsible for providing a service need not define what that administrator does as its back-end functions.

20. In relation to transparency, the view was expressed that the concept was critical in disputes involving consumers, but that in practice that was unrelated to the functions of a provider or platform (see para. 19 above). It was said that transparency was critical as regards, namely: (i) the clear identification at the outset of a dispute as to how that dispute would be resolved and who would be resolving that dispute; and (ii) the nature of the outcome of the dispute (e.g. as binding or otherwise).

21. It was said in support of a proposal for ensuring that the Rules retained a technologically neutral approach that the Rules ought not to be overly prescriptive in defining the technological methodology. Moreover, it was said that in practice the terms "ODR platform" and "ODR provider" were not used in the online dispute resolution field and that it was difficult to provide a clear and distinct definition for those terms.

22. The Working Group agreed to consider that matter further (see paras. 49-54 below).

*Concurrent proceedings*

23. It was said that the Rules currently contained provisions in draft articles 4A and 4B (paras. (4)(e) and (2)(d) respectively) to the effect that parties were not pursuing additional judicial remedies. It was suggested to delete those provisions in relation to Track II of the Rules, given that those provisions could in any event provide no comfort to the other party in law that another proceeding was not in fact being initiated.

24. Support was expressed for that proposal. It was also said that in the interests of transparency it might be advisable for a party to give notice of the initiation of any other proceedings to the other party in an ODR proceeding.

25. In that respect, it was suggested to include the words "and also information in relation to the pursuit of other legal remedies" at the end of paragraph (5) of article 4A and paragraph (3) of article 4B. After discussion, that proposal was agreed (see also paras. 83 and 85 below).

26. It was furthermore agreed to delete paragraphs (4)(e) of article 4A, and paragraph (2)(d) of article 4B (see also paras. 76 and 85 below).

*State of current practice in online dispute resolution*

27. A reference was made to the request of the Working Group at its twenty-eighth session (A/CN.9/795, para. 18) that the Secretariat prepare a report in relation to current practices in the online dispute resolution field in order to ensure that the work being undertaken by the Working Group remained relevant with existing frameworks.

28. The Secretariat reported that it had consulted informally with experts from multiple regions and with diverse practitioner and academic experience in relation to existing ODR practices and the implications of those practices for the Rules. The Secretariat explained that key points in relation to those consultations included: (i) the belief that both consumer and business groups around the world are unanimous in seeking fair, proportionate, effective, online, cross-border redress for low value cross-border disputes; (ii) that online dispute resolution already exists, and that even when the Rules were complete, they would be voluntary in nature and thus must accord with real life practice in order to be used in a commercial context; (iii) that there is a risk that overly prescriptive Rules would not be used in practice; (iv) that ODR administrators, marketplaces, and payment providers would in practice want the flexibility to design, build, and deploy both non-binding and binding ODR systems; (v) that tracking consumers and transactions on the basis of nationality and legal jurisdiction at the outset of a transaction would be very difficult for e-commerce merchants and marketplaces, and that additional requests for information in an online business transaction could result in the loss of customers; (vi) that the Internet is borderless, and applying different sets of procedural rules depending on the nationality of one disputing party would be commercially impractical for ODR entities and unlikely to happen in practice; and finally, (vii) that higher level process requirements or values (e.g. due process, transparency, impartiality) and limits as to when the rules apply, could provide a sound basis on which ODR administrators could design ODR systems that could best meet the needs of various disputes, marketplaces, and consumer communities.

29. In particular, it was emphasized by experts that there was a great need to develop fair, transparent dispute resolution processes that would provide access to justice for the broadest spectrum of consumers, and that overly prescriptive Rules might hamper that aim by creating a system that was unworkable in practice.

30. In response to the points set out in paragraphs 28-29 above, it was clarified that these were opinions expressed by experts, but that the ultimate decision-making in relation to the Rules lay with the Working Group. It was also said that further expert input could be useful in satisfying the request of the Working Group at its twenty-eighth session for the Secretariat to consult in relation to current ODR practice. It was also said that the benefit of the Rules was their ability to set a global reference standard that addressed differences in national law. It was furthermore observed that in a global standard, a certain level of detail could not be avoided.

31. In relation to specific questions posed in respect of current practice, it was said that the average value of transactions resolved by ODR in some marketplaces (the example was given of eBay) was approximately 75 USD for cases involving items not received and 100 USD for cases involving goods not as described, within a time frame of 10-16 days on average; another example was given of the Mexican online dispute resolution program of the national consumer protection agency (Concilianet), which was said to resolve cases with an average value of 300 USD within a time frame of 28 days. It was also said that a variety of processes existed for resolving disputes in different ODR systems, ranging from crowd-sourcing to algorithmic resolutions of disputes.

32. By way of conclusion, it was observed that the Working Group had expressed the view that the Rules ought to be as practical as possible in a global context, and it was important to find a balance and to bear in mind the existing practice of online

dispute resolution, and to design Rules that could encompass that practice and permit the evolution of practice.

*Twenty-ninth session*

33. It was proposed to proceed by considering Track II of the Rules, as contained in document A/CN.9/WG.III/WP.127 and its addendum.

## B. Notes on draft procedural rules

### 1. Draft article 1 (Scope of application)

34. The Working Group considered draft article 1 as contained in paragraph 29 of document A/CN.9/WG.III/WP.127.

*Paragraph (1)*

35. The Working Group considered whether the term "transaction" was sufficiently clear, or whether the phrase "contract concluded or performed using electronic communications" might be clearer (A/CN.9/WG.III/WP.127, paras. 8 and 32).

36. The view was expressed that replacing the words "transaction conducted by use of electronic communications" in paragraph (1) with "sales or service contract concluded using electronic communications" would lend greater clarity to the provision. After discussion, that proposal was agreed.

*Paragraph (1)(bis)*

37. The Working Group recalled its discussions regarding whether paragraph (1)(bis) might relate more appropriately to Track I proceedings than to simplified Track II proceedings where such formality might not be required (A/CN.9/795, para. 34).

38. A suggestion was made to: (i) remove the square brackets surrounding the provision as a whole, on the basis that the considerations therein are equally important in a Track II proceeding as in a Track I proceeding; (ii) add the words "and independent" between "separate" and "from" to further emphasize that the agreement to use the Rules should be an independent one; (iii) delete the words "to the buyer" following the phrase "notice in plain language"; and (iv) delete the square brackets around the word "and".

39. In relation to point (i) in paragraph 38 above, it was said that in practice, requiring a separate click from purchasers for additional contractual terms often led to a reduced number of transactions, and hence would be unlikely to be implemented by merchants. It was said in response that paragraph (1)(bis) ought to remain in the text as it provided an important consumer protection mechanism.

40. In relation to point (ii) in paragraph 38 above, it was said that adding the words "and independent" was redundant given the existing requirement for agreement under paragraph (1)(bis) to be "separate" from the transaction.

41. Some support was given to a proposal to retain the square brackets around the words "and whether Track I or Track II of the Rules apply to that dispute" pending the further consideration of Track I. Another suggestion was made to delete that text, and likewise to delete it where it appeared in Track I of the Rules.

42. A suggestion was made to replace the term "proceedings under the Rules" with the phrase "proceedings under these Rules".

43. After discussion, it was agreed to delete the square brackets around the entirety of the text of paragraph (1)(bis) and retain the language therein with the following modifications: (i) to delete the square brackets around the word "and" (see para. 38 above); (ii) to delete the words "to the buyer" (see para. 38 above); (iii) to add the words "and independent" after the word "separate" (see para. 40 above); (iv) in the fourth line, to replace the words "the Rules" with the phrase "these Rules" (see para. 42 above); and (v) to retain the internal square brackets and text therein (see para. 41 above).

44. Consequent to that agreement, paragraph (1)(bis) would read as follows: "Explicit agreement referred to in paragraph (1) above requires agreement separate and independent from that transaction, and notice in plain language that disputes relating to the transaction and falling within the scope of the Rules will be resolved through ODR proceedings under these Rules [and whether Track I or Track II of the Rules apply to that dispute] (the 'dispute resolution clause')".

*Paragraph (2)*

45. It was agreed to delete the square brackets around subparagraphs (a) and (b) of paragraph (2) and to permit the Secretariat to ensure that language was consistent with other provisions in paragraph (1). It was agreed that the language "at the time of the transaction" would be deleted pursuant to a decision of the Working Group at its twenty-eighth session (A/CN.9/795, para. 41).

*Paragraph (3)*

46. After discussion, it was agreed to retain paragraph (3) in the form set out at paragraph 29 of document A/CN.9/WG.III/WP.127.

## 2. Draft article 2 (Definitions)

47. The Working Group considered draft article 2 as contained in paragraph 38 of document A/CN.9/WG.III/WP.127.

*Paragraph (1)*

48. After discussion, it was agreed to retain paragraph (1) in the form set out at paragraph 38 of document A/CN.9/WG.III/WP.127.

*Paragraphs (2) and (3)*

49. The Working Group recalled its discussion in relation to the terms "ODR platform", "ODR provider" and "ODR administrator" (see paras. 16-22 above).

50. It was said that the term "ODR administrator" could better encompass the different types of entities undertaking a function of administrating ODR without prescribing the nature of the entity providing the service. It was further suggested that in addition to a definition of "ODR administrator", it was important to retain the term "ODR platform" in order to ensure that the Rules clearly expressed that communications were to take place via a platform rather than, for example, in hard copy.

51. In relation to the need to differentiate liability of different entities, an example was given of a dispute resolution system that encompassed servers, neutrals and administrators all located in different jurisdictions, but where the ultimate liability rested with a central entity. It was said that the term "ODR administrator" was preferable in light of that type of example given the breadth of that term in practice, and that it might also eliminate the need to define "ODR platform" separately.

52. In response, a view was expressed that "ODR platform" was an important component of an ODR process and consequently ought to be included in the Rules. A new definition for that term was proposed as follows: "'ODR platform' means a system for generating, sending, receiving, storing, exchanging or otherwise processing communications under these Rules."

53. It was said that it was important to link the discussion of an "ODR administrator" with article 12 of the Rules in relation to the entity specified in the dispute resolution clause. With that in mind, a new definition for the term "ODR administrator" was proposed as follows: "'ODR administrator' means the entity that administers and coordinates ODR proceedings under these Rules, including where appropriate, by administering an ODR platform, and which is specified in the dispute resolution clause".

54. After discussion, it was agreed that the definitions of "ODR administrator" and "ODR platform" as set out in paragraphs 52 and 53 above would replace the definitions set out in options 1, 2 and 3 of paragraph (1) of article 2 (para. 38 of document A/CN.9/WG.III/WP.127), and that the term "ODR provider" and all references thereto would be deleted from the Rules.

*Paragraphs (4), (5) and (6)*

55. After discussion, it was agreed to retain paragraphs (4), (5) and (6) as set out in paragraph 38 of document A/CN.9/WG.III/WP.127.

*Paragraph (7)*

56. After discussion, it was agreed that option 1 in relation to paragraph 7, setting out a consolidated definition of "communication", should be used to define that term in the Rules.

*Electronic address*

57. A suggestion was made to define "electronic address" or "designated electronic address" in the Rules. One suggestion was made to define the latter term as follows: "'Designated electronic address' means the electronic address designated by each party and by the ODR administrator for the purposes of exchanging communication under these Rules".

58. The Working Group recalled that the United Nations Convention on the Use of Electronic Communications in International Contracts contained some guidance in relation to the term "electronic address" at paragraph 185 of the explanatory note thereto (see A/CN.9/WG.III/WP.127).

59. After discussion, it was agreed that the Rules ought to contain a definition of the term "electronic address" and the Secretariat was requested to include language in that respect in the next iteration of the Rules, taking into account existing usage of that term in UNCITRAL texts.

### 3. Draft article 3 (Communications)

60. The Working Group considered draft article 3 as contained in paragraph 46 of document A/CN.9/WG.III/WP.127.

*Paragraphs (1), (2) and (3)*

61. A proposal was made to replace paragraph (1) as follows: "All communications in the course of ODR proceedings shall be communicated to the ODR administrator via the ODR platform. The electronic address of the ODR platform to which documents must be submitted shall be specified in the dispute resolution clause."

62. It was suggested to add an additional sentence to the end of paragraph (1) as set out in paragraph 61 above, as follows: "Each party shall provide the ODR administrator with an electronic address to be used for communications". It was said that that change would enable the deletion of paragraphs (2) and (3).

63. A concern was raised that deleting paragraphs (2) and (3) would have the consequence of eliminating language providing for parties to update their electronic addresses. In response, it was said that the language proposed in paragraph 62 above was broad enough to encompass the provision of updated electronic addresses by the parties.

64. After discussion, it was agreed that paragraph (1) would be redrafted pursuant to the proposals set out in paragraphs 62-63 above, and that paragraphs (2) and (3) would be deleted.

*Paragraph (4)*

65. After discussion, it was agreed that the second sentence of paragraph (4) would be better placed in draft article 11, and the Secretariat was requested to relocate that provision accordingly (A/CN.9/WG.III/WP.127, para. 51).

*Paragraph (5)*

66. A suggestion was made to replace paragraph (5) as follows: "The ODR administrator shall promptly acknowledge receipt of any communications by a party or the neutral at their electronic addresses." After discussion, that proposal was agreed.

*Paragraph (6)*

67. A suggestion was made to replace paragraph (6) as follows: "The ODR administrator shall promptly notify a party or the neutral of the availability of any communication directed to that party or the neutral at the ODR platform." After discussion, that proposal was agreed.

*Paragraph (7)*

68. After discussion, it was agreed to retain paragraph (7) in the form set out at paragraph 46 of document A/CN.9/WG.III/WP.127.

**4. Draft article 4A (Notice)**

69. The Working Group considered draft article 4A as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

*Paragraph (1)*

70. After discussion, it was agreed to retain paragraph (1) as set out in paragraph 52 of document A/CN.9/WG.III/WP.127.

*Paragraph (2)*

71. A proposal was made to delete the first sentence, and retain the second sentence, of paragraph (2). A view was expressed that that paragraph was redundant in light of paragraph (6) of draft article 3 (see para. 67 above). In response, it was said that it was important for explicit provision to be made for the respondent to be notified following the submission of a notice by a claimant. After discussion it was agreed to retain the second sentence without square brackets, and to delete the text of the first sentence of that paragraph, such that it would read: "The ODR provider shall promptly notify the respondent that the notice is available at the ODR platform."

*Paragraph (3)*

72. General support was expressed for option 1. A suggestion was made to replace the language set out in option 1 as follows: "ODR proceedings shall be deemed to commence when, following communication to the ODR administrator of the notice pursuant to paragraph (1), the ODR administrator notifies the parties of the availability of the notice at the ODR platform."

73. After discussion, the language as set out in paragraph 72 above was agreed.

*Paragraph (4)*

*Subparagraphs (a) and (b)*

74. After discussion, it was agreed to (i) retain the phrase "electronic address" in subparagraph (a); and (ii) delete the word "designated" in subparagraphs (a) and (b). In all other respects it was agreed to retain the language of subparagraphs (a) and (b) as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

*Subparagraphs (c) and (d)*

75. After discussion, it was agreed to retain the text of subparagraphs (c) and (d) as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

*Subparagraph (e)*

76. The Working Group recalled its decision to delete subparagraph (e) (see above, paras. 23-26).

*Subparagraph (f)*

77. No objections were raised to the language in subparagraph (f) and consequently it was agreed to retain the language as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

*Subparagraph (g)*

78. After discussion, it was agreed to retain subparagraph (g) in the form set out at paragraph 52 of document A/CN.9/WG.III/WP.127 (see also below, para. 157).

*Subparagraph (h)*

79. It was proposed to delete the phrase "including any other identification and authentication methods" (A/CN.9/WG.III/WP.127, para. 62) on the basis that that text was redundant with the term "signature", which, as used in UNCITRAL texts on e-commerce included other identification and authentication methods. Support was expressed for that proposal.

80. In response, concerns were raised that the terms "signature" and "electronic signature" were not clear for consumers. A proposal was made to include examples of electronic signatures in the Rules or in the commentary.

81. Another suggestion was made to use the term "electronic signature" in lieu of the term "signature".

82. After discussion, it was agreed to retain the language as set out in paragraph 52 of document A/CN.9/WG.III/WP.127, to retain the language "and/or the claimant's representative" and delete the square brackets around those words. Another proposal was made to replace references in the Rules to "signature" (in article 4A(4)(h), and article 4B(2)(g)) with the phrase "signature or other means of identification and authentication". After discussion, that proposal was agreed.

*Paragraph (5)*

83. The Working Group recalled its decision to add the words "and also information in relation to the pursuit of other legal remedies" at the end of paragraph (5) (para. 25, above). In all other respects it was agreed to retain the language of paragraph (5) as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

## 5. Draft article 4B (Response)

84. The Working Group considered draft article 4B as contained in paragraph 65 of document A/CN.9/WG.III/WP.127.

85. After discussion, it was agreed to make consequential changes to article 4B to retain consistency with the changes made in article 4A (see paras. 23-26 and 69-83 above, and para. 157 below). In all other respects it was agreed to retain the text of article 4B as contained in paragraph 52 of document A/CN.9/WG.III/WP.127.

### 6. Draft article 4C (Counterclaim)

86. The Working Group considered draft article 4C as contained in paragraph 67 of document A/CN.9/WG.III/WP.127. After discussion, it was agreed to retain that article in the form set out therein.

### 7. Draft article 5 (Negotiation)

87. The Working Group considered draft article 5 as contained in paragraph 70 of document A/CN.9/WG.III/WP.127.

*General*

88. A proposal was made that commentary or guidelines to the Rules indicate, in relation to a negotiation stage, that an ODR administrator should give a description to parties of what types of technical programmes it uses and the way negotiation will be conducted — for example, whether algorithms would be used.

89. It was agreed to include such an indication in guidelines or commentary. It was further agreed to retain article 5 in the form set out in paragraph 70.

### 8. Draft article 6 (Facilitated settlement)

90. The Working Group considered draft article 6 as contained in paragraph 77 of document A/CN.9/WG.III/WP.127.

*Paragraph (1)*

91. After discussion, it was agreed to retain paragraph (1) in the form set out in paragraph 77 of document A/CN.9/WG.III/WP.127.

*Paragraphs (2) and (3)*

92. It was proposed that in paragraph (2), language be inserted such that the ODR administrator would be required to give notice to the disputing parties of the ten-day deadline specified in paragraph (3). That proposal was accepted, and the Secretariat was requested to insert language in that respect, and to make any consequential changes required in paragraph (3).

### 9. Draft article 7 (Recommendation by a neutral)

93. The Working Group considered draft article 7 as contained in paragraph 82 of document A/CN.9/WG.III/WP.127.

*Paragraphs (1)-(3)*

94. After discussion, it was agreed to retain paragraphs (1) to (3) in the form set out in paragraph 82 of document A/CN.9/WG.III/WP.127.

*Paragraph (4)*

95. The view was expressed that the second sentence of paragraph (4) ought to be retained. It was said in support of that view that that sentence improved clarity and legal certainty. It was further explained that that sentence encapsulated the essence of what distinguished Track II from Track I, namely that the outcome of the former did not have a res judicata effect. Nonetheless, it was said that Track II could be coupled with mechanisms that would encourage compliance, and that the Rules ought to state that possibility explicitly.

96. In response, it was said that the second sentence of paragraph (4) was not appropriate in procedural rules and would be better placed in commentary or guidelines.

97. A proposal was made to replace the second sentence as follows: "The ODR administrator may introduce the use of trustmarks or other methods to identify and encourage compliance with recommendations".

98. After discussion, a second proposal, intended to replace the entirety of paragraph (4), and taking into account the proposal set out in paragraph 97 above, was made as follows ("the second proposal"): "The recommendation shall not be binding on the parties. However, a party or both parties may commit to comply with the recommendation. The ODR administrator may introduce mechanisms to encourage compliance with the recommendation." It was suggested that in addition to that proposal, it would be helpful to insert in the preamble to Track II, language that would make it clear that the recommendation under Track II would not produce a res judicata effect.

99. In support of the second proposal, it was said that it included generic language that was open in relation to the point in time at which agreement was required, and that it provided for a commitment by one or both parties to comply with the recommendation.

100. It was suggested to modify the last sentence of the second proposal so that it would read as follows: "Mechanisms to encourage compliance with the recommendation may be introduced."

101. A question was raised as to the legal effect intended when the disputing parties agreed to comply with the recommendation, and specifically whether that would produce a contractual agreement that could be enforced. It was said that if that were the case, it might be advisable to link such an agreement to the provision on settlement (draft article 8). Another view was expressed that it was important to retain a distinction between settlement and an agreement to comply with a recommendation.

102. It was said that the second proposal raised a number of technical and substantive concerns. It was said that the language reduced transparency for disputing parties, by enabling two different possible outcomes: a non-binding process, and a binding process capable of ending in an outcome enforceable by a court. It was also said that the concept of including mechanisms that would encourage compliance with a recommendation in a non-binding process was problematic insofar as it could be viewed as coercive. It was moreover said that the intention of the proposal to enable, at least in some instances, a binding outcome enforceable in court, was similar to a Track I outcome and as such raised a

question regarding different attitudes toward the two tracks, as reflected in negative terminology and additional requirements proposed for Track I in document A/CN.9/WG.III/WP.123, article 1A and article 1(3), option 1.

103. In response to those concerns, it was said that it was clear that Track II does not lead to a result that would be enforceable before the courts. A distinction was made between a traditional court proceeding, ending in an outcome that could be enforced, and a Track II proceeding, which ended in a recommendation that could not be enforced in the courts, and which was not equivalent to such a court decision. It was furthermore said that an agreement between disputing parties to abide by a recommendation would not make that recommendation enforceable in a court.

104. In response, it was said that an agreement to be bound by a recommendation did itself provide a basis for initiating court proceedings, and consequently a basis for initiating enforcement proceedings. It was said in response that there was a fundamental difference between providing a basis for commencing court proceedings, and a basis for commencing enforcement proceedings.

105. It was said that in the context of low-value electronic commerce disputes, the likelihood of any party resorting to court was very low.

106. After discussion, it was concluded that the language as set out in paragraph 82 of A/CN.9/WG.III/WP.127 would be retained as option 1, and the language set out in paragraph 98 above, as option 2.

*Timing of agreement*

107. In relation to the specification in paragraph (4) that the recommendation shall not be binding on parties "unless they otherwise agree", a proposal was made to require that agreement to take place before a recommendation had been communicated. In response, it was said that leaving the timing of such agreement open provided for greater flexibility in the dispute, and furthermore the form in which that agreement was given could be determined by the ODR administrator.

*Conclusion*

108. It was agreed that the recommendation as provided for in article 7 of Track II was intended to have a non-binding effect. In relation to the effect of an agreement to comply with a recommendation, it was said that the Working Group had expressed different views both on the legal nature of that agreement and the relative importance of the stage of court proceedings it might trigger, and that that issue deserved further discussion. Finally it was observed that in relation to a compliance mechanism referred to in the second proposal, that whether such a mechanism ought to be addressed in the Rules, and if so, the location of such a reference, remained a matter for further consideration.

## 10. Draft article 8 (Settlement)

109. The Working Group considered draft article 8 as contained in paragraph 88 of document A/CN.9/WG.III/WP.127. After discussion, it was agreed to retain that article in the form set out therein.

## 11. Draft article 9 (Appointment of a neutral)

110. The Working Group considered draft article 9 as contained in paragraph 1 of document A/CN.9/WG.III/WP.127/Add.1.

*General*

111. A view was expressed that, in view of the discussion set out in paragraphs 27-32 above, article 9, as well as other articles in the Rules, could be further streamlined, particularly in relation to deadlines specified. It was clarified that the deadlines in the Rules would be reconsidered in their entirety at a later stage (see paras. 165-166 below).

*Paragraph (1)*

112. A proposal was made in relation to paragraph (1) to replace the words "and any other relevant or identifying information in relation to that neutral" with the phrase "and of the information in relation to that neutral as set out in points [...] of the Guidelines and Minimum Requirements for Neutrals". It was said that specific guidance ought to be set out in relation to the information required to be provided to disputing parties in respect of each neutral, and that providing such information in guidelines for neutrals could create clarity in that respect.

113. In response, it was said that procedural rules should not rely on guidelines for specific information relevant to the functioning of those rules, and to include such a provision in the Rules would set an undesirable precedent for UNCITRAL texts.

114. After discussion, it was agreed that the Rules should be clear and understandable to users, and the Working Group agreed to consider further the matter of how to enunciate in the Rules themselves what information ought to be provided to disputing parties in respect of the neutral.

*Paragraphs (2)-(7)*

115. After discussion, it was agreed to retain paragraphs (2) to (7) as set out in paragraph 1 of document A/CN.9/WG.III/WP.127/Add.1.

*Paragraph (8)*

116. It was said that as an important provision, paragraph (8) ought to include language requiring the neutral to inform parties of the deadline in which they might object to the provision of information generated during the negotiation stage. That proposal received support.

117. After discussion, it was agreed that paragraph (8) would be retained in the form set out in paragraph 1 of document A/CN.9/WG.III/WP.127/Add.1, but that the Secretariat would add a general provision in the Rules to reflect that the neutral or ODR administrator should notify parties of all relevant deadlines during the course of proceedings.

*Paragraph (9)*

118. After discussion, it was agreed that paragraph (9) would be retained in the form set out in paragraph 1 of document A/CN.9/WG.III/WP.127/Add.1.

### 12. Draft article 10 (Resignation or replacement of neutral)

119. The Working Group considered draft article 10 as contained in paragraph 8 of document A/CN.9/WG.III/WP.127/Add.1. After discussion, it was agreed to retain that article as set out therein.

### 13. Draft article 11 (Power of neutral)

120. The Working Group considered draft article 11 as contained in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

*Paragraph (1)*

121. After discussion, it was agreed that paragraph (1) would be retained in the form set out in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

*Paragraph (1)(bis)*

122. After discussion, it was agreed that paragraph (1)(bis) would be retained in the form set out in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

*Paragraphs (2) and (3)*

123. A proposal was made to merge paragraphs (2) and (3) as follows: "Subject to any objections under article 9, paragraph (8), the neutral shall conduct the ODR proceedings on the basis of documents submitted by the parties, any communications made by them to the ODR administrator, and such other materials as the neutral may request or allow the parties to submit. The neutral shall determine time periods for the submission of such other materials." That proposal did not receive support.

124. In relation to paragraph (2), it was said that that paragraph was an important provision allowing each party to be heard and promoting a fair and transparent process. A query was raised as to whether that provision provided for a decision to be made only on the basis of communications that were transparent to both parties. In response, it was clarified that paragraph (2) was subject to article 9(8), which permitted parties to object to the provision of communications to the neutral.

125. After discussion, it was agreed to retain paragraph (2) as set out in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

126. In relation to paragraph (3), it was suggested that allowing the neutral to request further information from the parties could burden the process, and a proposal was made to replace the word "request" in that paragraph with the word "allow". In response, it was said that the principle of permitting the neutral to request additional documents was consumer protective, and provided the neutral with the discretion to suggest to parties that they may wish to submit a certain document.

127. After discussion, it was agreed to retain paragraph (3) as set out in paragraph 9 of document A/CN.9/WG.III/WP.127/Add.1.

*Paragraph (4)*

128. It was said that paragraph (4) was not necessary to include, on the basis that a competence-competence provision in relation to neutrals was not appropriate for simple, streamlined Rules. After discussion, it was agreed to delete paragraph (4).

*Paragraph (5)*

129. The Working Group recalled its decision to relocate the second sentence of article 3(4) (as set out in A/CN.9/WG.III/WP.127), to article 11 (see para. 65 above). That sentence read as follows: "The neutral may in his or her discretion extend any deadline in the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform".

130. A proposal was made to replace paragraph (5) with that sentence, but to modify that sentence to provide for greater flexibility such that the neutral would have a general power to extend any deadline without a need for a party to show good cause. A view was expressed that unlike the text set out in paragraph 129 above, paragraph (5) provided for a neutral to "make inquiries" in determining whether or not to extend deadlines, and that it was important to retain such a concept.

131. Consequently it was suggested that paragraph (5) be replaced with the following sentence: "The neutral, after making such inquiries as he or she may deem necessary, may, in his or her discretion, extend any deadlines under these Rules". A view was expressed that the phrase "such inquiries as he or she may deem necessary" was vague, and that examples of what those inquiries might be could be set out in guidelines.

132. After discussion, the proposed language in paragraph 131 above was agreed, and it was furthermore suggested that examples of possible inquiries by a neutral be provided for in guidelines.

## 14. Draft article 12 (ODR provider)

133. The Working Group considered draft article 12 as contained in paragraph 15 of document A/CN.9/WG.III/WP.127/Add.1.

134. It was said that both the ODR platform and the ODR administrator ought to be specified in the dispute resolution clause for purposes of transparency and accountability. After discussion, it was agreed that draft article 12 would read as follows: "The ODR platform and ODR administrator shall be specified in the dispute resolution clause."

*Model dispute resolution clause*

135. A proposal was made to include, as an Annex to the Rules, a model dispute resolution clause. That proposal received support. In relation to the content of such a clause, it was said that it should address the essential functional elements of an ODR process. It was also said that a model clause should contain a link to the website of the ODR administrator, to provide for additional transparency for users.

136. As a general comment, it was suggested that at the time a buyer agreed to an ODR process, it would need information in plain language and in a language it

could understand as to the detail of the process, all the steps involved in ODR proceedings, the language of the proceedings, and the outcome of the proceedings. It was said that while that information may not need to be in a model clause, it should be made available to buyers at the time of agreement to submit disputes to ODR under the Rules.

137. Delegations were invited to consult with a view to agreeing upon a draft model dispute resolution clause which would be considered at a later stage.

### 15. Draft article 13 (Language of proceedings)

138. The Working Group considered draft article 13 as contained in paragraph 17 of document A/CN.9/WG.III/WP.127/Add.1.

139. It was said that a provision on language needed to be flexible, and sensitive to technology that was already being used to promote multilingual proceedings or to reduce language barriers, such as translation tools and pictograms. It was further suggested that an administrator would necessarily determine language, as a neutral would not in any event be appointed at the outset of ODR proceedings.

140. In response, a view was expressed that an ODR administrator ought not to have an unlimited choice of languages to choose from, and that the language of the offer of the underlying transaction — in other words, the language in which the merchant offered the goods or services to the purchaser — should be the language of the dispute resolution proceedings. A different view was expressed that concluding a transaction in a foreign language was often unproblematic, but that conducting dispute resolution proceedings would be much more complex.

141. A proposal was made to replace article 13 with the following language: "The proceedings shall be conducted in the language or languages which the parties understand and in which they are able to communicate." It was said in support of that proposal that it did not give any discretion to an ODR administrator or neutral and that it implied that technology could be used to provide for multiple languages in the event parties did not have a common language. It was further said that additional guidance in relation to translation, including technical tools to assist with translation, could be set out in guidelines.

142. Concerns were expressed that that proposal did not provide for certainty that an ODR platform or administrator could accommodate the languages of the parties, and that it did not provide an initial reference point from which to offer proceedings. In that respect, it was suggested that the language of proceedings be linked to the language of the transaction or the contract.

143. A second proposal was made to replace article 13 in its entirety with the following language: "The ODR proceedings shall take place in the language of the underlying ODR agreement. In the event that a party indicates to the ODR administrator or neutral that it does not wish to proceed in that language, the ODR administrator or neutral shall identify other languages the parties can select for the proceedings. The proceedings shall then be conducted in the language or languages that the parties understand." In support of that proposal, it was said that it provided for a language in which the ODR administrator or platform could commence proceedings, with a mechanism for parties to express a preference for another

language if that initial choice was not acceptable. The desirability of including guidance in relation to translation and tools for translation was reiterated.

144. A concern was raised that parties ought to be able to know in advance of ODR proceedings which languages were available. Likewise, it was said that the dispute resolution clause might need to be provided to parties in a language that they understood.

145. Another view was expressed that existing online translation tools were not adequate and that a neutral or ODR administrator should select a common language to be used, such as that used in the transaction.

146. In response, it was said that the language of the transaction or the contract could serve as a default language for proceedings, but that parties to a dispute ought to have the possibility to select a language in which they would be more comfortable conducting a dispute, if such a language was provided for by the ODR platform or administrator.

147. After discussion, another proposal was made in relation to article 13, as follows (the "third proposal"): "The ODR proceedings shall take place in the language of the offer for ODR proceedings accepted by the buyer. In the event that a party indicates in a notice or response that it wishes to proceed in another language, the ODR administrator shall identify available languages that the parties can select for the proceedings. The ODR proceedings shall be conducted in the language or languages that the parties select."

148. It was said in support of the third proposal that it provided notice to the buyer of the language in which proceedings would be conducted, and likewise provided guidance in relation to the language to be used at the inception of proceedings, while allowing flexibility to parties to adjust their decision within the framework offered by the administrator during the course of proceedings. It was said that in the very small number of possibilities where one of the languages offered was not a language in which a party felt it could communicate, that was a matter best addressed in commentary.

149. Several modifications were proposed in relation to the language of the third proposal as set out in paragraph 147 above as follows. First, a proposal was made to replace, in the second sentence, the phrase "available languages that the parties can select for the proceedings", with the phrase "a language or languages in which the parties can communicate".

150. A different modification to the language of the third proposal was suggested as follows: (i) in the first sentence, to insert the word "indicated in the offer for ODR proceedings" in replacement of the words "of the offer for ODR proceedings"; and (ii) to merge the second and third sentences, by inserting the word ", and" between them. It was clarified that in relation to (i), the intention was to indicate in the dispute resolution clause the language in which proceedings would take place.

151. In response to the third proposal set out in paragraph 147 above, as well as the modifications thereto proposed in paragraph 150 above, it was said that requiring the language in which ODR proceedings were to take place to be specified in the dispute resolution clause would permit a merchant to offer transactions in one language (the language of the target market, for example) and mandate that dispute resolution proceedings would take place in another (the language, for

example, of that merchant's primary place of business). A concern was also raised that the draft text of the third proposal would not accommodate a situation in which an ODR administrator indicated languages that could be selected, but where a party refused or failed to select one of those languages.

152. An additional proposal was made to modify the text of the third proposal with the second modification proposed in paragraph 150 above, so that article 13 would read as follows: "The ODR proceedings shall take place in the language of the offer for ODR proceedings accepted by the buyer. In the event that a party indicates in a notice or response that it wishes to proceed in another language, the ODR administrator shall identify available languages that the parties can select for the proceedings, and the ODR proceedings shall be conducted in the language or languages that the parties select."

153. Three concerns were raised in relation to that proposal. First, it was said that the term "offer for ODR proceedings accepted by the buyer" was ambiguous insofar as it appeared to be referring to the "dispute resolution clause" defined in article 1(1)(bis), and moreover, that the term "buyer" was not defined anywhere in the Rules.

154. Second, it was said that the Rules or guidelines should send a strong message to ODR administrators that they ought, under that provision, to make reasonable efforts to provide as broad a spectrum of languages as possible.

155. Third, it was said that the language in that proposal should ensure that it would capture the need for a complaint form to be provided in the language selected by the claimant.

156. It was furthermore suggested that further thought ought to be given as to whether the dispute resolution clause should specifically set out the languages in which the services ought to be provided.

157. After discussion, it was agreed that the language set out in paragraph 152 above would replace the entirety of article 13 as set out in paragraph 17 of A/CN.9/WG.III/WP.127/Add.1. It was furthermore clarified that the provisions on language in articles 4A(4)(g) and 4B(2)(f) would not require further modification (see above, paras. 78 and 85).

### 16. Draft article 14 (Representation)

158. After discussion, the Working Group agreed to retain article 14 in the form set out in paragraph 18 of document A/CN.9/WG.III/WP.127/Add.1.

### 17. Draft article 15 (Exclusion of liability)

159. A proposal was made to delete article 15 on the basis that such a waiver of liability in relation to ODR administrators and neutrals could be best placed in contractual arrangements that included those entities as parties. A reference was made to a mirror provision in Article 16 of the UNCITRAL Arbitration Rules 2010, which provided for exclusion of liability against relevant third parties in arbitration proceedings.

160. After discussion, it was agreed to delete article 15.

### 18. Draft article 16 (Costs)

161. A proposal was made to retain article 16 and to retain the word "decision", in lieu of "award", such that the provision would read as follows: "The neutral shall make no decision as to costs and each party shall bear its own costs."

162. Consensus was recorded in relation to the principle that the winning party in ODR proceedings ought not to be able to reclaim its costs from the losing party.

163. After discussion, the language set out in paragraph 161 above was agreed.

*Fees*

164. A concern was expressed that the Rules did not currently address the need for fees levied by ODR administrators or platforms to be reasonable. It was agreed that a new provision could be included for consideration in that respect at a future session.

### 19. Other matters

*Timelines*

165. The Working Group recalled its decision to reassess the timelines in the Rules as a whole at the conclusion of its deliberations on Track II. In relation to timelines, it was suggested that a more generic, flexible approach that was not so prescriptive would be desirable. It was said that the Rules needed to be informative to potential users and also needed to give sufficient discretion to ODR administrators and neutrals to modify time frames as needed, on the understanding that a primary objective was to accommodate a fair and efficient process.

166. The Working Group agreed to consider that matter further at a later stage.

## C. Other business

167. Several delegations expressed disappointment that document A/CN.9/WG.III/WP.125 had not been discussed during the course of the Working Group's twenty-ninth session.

United Nations A/CN.9/802

General Assembly

Distr.: General
8 April 2014

Original: English

**United Nations Commission on International Trade Law**
**Forty-seventh session**
New York, 7-25 July 2014

# Report of Working Group VI (Security Interests) on the work of its twenty-fifth session (New York, 31 March-4 April 2014)

## Contents


| | | *Paragraphs* | *Page* |
|---|---|---|---|
| I. | Introduction | 1-4 | 2 |
| II. | Organization of the session | 5-10 | 3 |
| III. | Deliberations and decisions | 11 | 4 |
| IV. | Draft Model Law on Secured Transactions | 12-110 | 4 |
| | A. Chapter IV. The registry system (A/CN.9/WG.VI/WP.59/Add.1) | 12-14 | 4 |
| | B. Chapter VI. Enforcement of a security right (A/CN.9/WG.VI/WP.57/Add.2) | 15-31 | 5 |
| | C. Chapter VII. Asset-specific rules (A/CN.9/WG.VI/WP.57/Add.3) | 32-65 | 8 |
| | D. Chapter VIII. Transition (A/CN.9/WG.VI/WP.57/Add.3) | 66-71 | 15 |
| | E. Non-intermediated securities | 72-95 | 16 |
| | F. Annex I. Acquisition financing (A/CN.9/WG.VI/WP.57/Add.4) | 96-102 | 21 |
| | G. Annex II. Conflict of laws (A/CN.9/WG.VI/WP.57/Add.4) | 103-108 | 23 |
| | H. Chapter I. Scope of application and general provisions (A/CN.9/WG.VI/WP.59) | 109-110 | 23 |


V.14-02247 (E) 140414 150414

Please recycle

# I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a model law on secured transactions (the "draft Model Law"), pursuant to a decision taken by the Commission at its forty-fifth session (New York, 25 June-6 July 2012).[1] At that session, the Commission agreed that, upon its completion of the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide"), the Working Group should undertake work to prepare a simple, short and concise model law on secured transactions based on the general recommendations of the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") and consistent with all texts prepared by UNCITRAL on secured transactions, including the United Nations Convention on the Assignment of Receivables in International Trade (the "United Nations Assignment Convention"), the Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement") and the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide").[2] The Commission also agreed that, consistent with the Commission's decision at its forty-third session, in 2010, the topic of security rights in non-intermediated securities, in the sense of securities other than those credited in a securities account, should continue to be retained on the future work programme for further consideration, on the basis of a note to be prepared by the Secretariat, which would set out all relevant issues so as to avoid any overlap or inconsistency with texts prepared by other organizations.

2. At its twenty-third session (New York, 8-12 April 2013), the Working Group had a general exchange of views on the basis of a note prepared by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.55 and Add.1 to 4).

3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission noted that the Secretariat was in the course of preparing a revised version of the draft Model Law that would implement the mandate given by the Commission to the Working Group and facilitate commercial finance transactions.[3] It was agreed that the preparation of the draft Model Law was an extremely important project to complement the work of the Commission in the area of security interests and provide urgently needed guidance to States as to how to implement the recommendations of the Secured Transactions Guide. It was also agreed that, in view of the importance of modern secured transactions law for the availability and the cost of credit, and the importance of credit for economic development, such guidance was extremely important and urgent to all States at a time of economic crisis but in particular to States with developing economies and economies in transition. In addition, it was stated that the scope of the draft Model Law should include all economically valuable assets.[4] After discussion, the Commission confirmed the mandate it had given to Working Group VI in 2012

[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 105.

[2] Ibid.

[3] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 192.

[4] Ibid., para. 193.

(see para. 1 above).[5] The Commission also agreed that whether that work would include security interests in non-intermediated securities would be assessed at a future time.[6]

4. At its twenty-fourth session (Vienna, 2-6 December 2013), the Working Group continued its work based on a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.57 and Add.1 and 2) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (A/CN.9/796, para. 11).

## II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its twenty-fifth session in New York from 31 March to 4 April 2014. The session was attended by representatives of the following States members of the Working Group: Algeria, Armenia, Austria, Belarus, Brazil, Canada, Colombia, Ecuador, France, Germany, Honduras, Hungary, Indonesia, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Pakistan, Panama, Paraguay, Philippines, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey and United States of America.

6. The session was attended by observers from the following States: Angola, Democratic Republic of the Congo, Ethiopia, Guatemala, Libya and Qatar. The session was also attended by an observer from the Holy See.

7. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: World Bank and World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: Organization of American States (OAS); and

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Asociación Interamericana de Derecho Internacional Privado (ASADIP), Commercial Finance Association (CFA), European Communities Trade Mark Association (ECTA), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICACIC), Inter-American Bar Association (IABA), International Chamber of Commerce (ICC), International Insolvency Institute (III), Moot Alumni Association (MAA), National Law Cen.re for Inter-American Free Trade (NLCIFT) and New York City Bar Association (NYCBAR).

8. The Working Group elected the following officers:

*Chairman*: Sr. Rodrigo LABARDINI FLORES (Mexico)

*Rapporteur*: Ms. Verena CAP (Austria)

[5] Ibid., para. 194.
[6] Ibid., para. 332.

9. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.58 (Annotated Provisional Agenda), A/CN.9/WG.VI/WP.57 Addenda 2 to 4 (Draft Model Law on Secured Transactions), and A/CN.9/WG.VI/WP.59 and Addendum 1 (Draft Model Law on Secured Transactions).

10. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Draft Model Law on Secured Transactions.
5. Other business.
6. Adoption of the report.

## III. Deliberations and decisions

11. The Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.57 Add.2-4 and A/CN.9/WG.VI/WP.59 and Add.1). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to revise the draft Model Law to reflect the deliberations and decisions of the Working Group.

## IV. Model Law on Secured Transactions

### A. Chapter IV. The registry system (A/CN.9/WG.VI/WP.59/Add.1)

12. Recalling its decision taken at its twenty-fourth session (see A/CN.9/796, para. 90), the Working Group considered chapter IV with a view to determining which articles should be included in the draft Model Law and which articles should be included in a draft model regulation to be set out in an annex to the draft Model Law (see A/CN.9/WG.VI/WP.59/Add.1). In that context, it was noted that, according to subparagraph 9 (m) of the Registry Guide and depending on the legislative policy and drafting technique of each enacting State, a regulation could include administrative rules or legal rules that would fit in secured transactions or other law.

13. At the outset, the Working Group agreed that guidance should be drawn from the Secured Transactions Guide and that similar issues should be dealt with in the same way. In addition, it was agreed that the preparation of registration-related rules was part of the mandate given to the Working Group by the Commission to prepare a simple, short and concise model law on secured transactions based on the recommendations of the Secured Transactions Guide and consistent with all texts prepared by UNCITRAL on secured transactions (see paras. 1 and 3 above). Moreover, it was widely felt that a distinction between legal issues that should be addressed in the draft Model Law and technical issues that should be addressed in a draft model regulation to be set out in an annex to the draft Model Law would make

it easier for the Working Group to make progress with its work to prepare a simple, short and concise draft model law.

14. After discussion, it was agreed that the following articles should be retained in the draft Model Law as they dealt with important legal issues or issues that were normally addressed in secured transactions law: 19, 21, paragraphs 1 and 2, 23, paragraph 2, 24 to 28, 29, subparagraph (b), 36, 38, 40, paragraph 1 (which might be merged with art. 36), 41, paragraphs 2 and 3, 42, 43, paragraphs 1 and 3, 47, paragraphs 1 and 5-7 (while the time period referred to in para. 3 should be included in para. 5). In addition, it was agreed that all the other provisions in chapter IV dealt with technical registration-related issues and should thus be included in an annex to the draft Model Law together with an additional article to deal with registry fees. Moreover, it was agreed that the substantive content of all those articles would be considered at a future session.

## B. Chapter VI. Enforcement of a security right (A/CN.9/WG.VI/WP.57/Add.2)

### Article 56. General standard of conduct in the context of enforcement and Article 57. Limitation on party autonomy

15. The Working Group confirmed its decision that articles 56 and 57, paragraph 1, should be placed in the general provisions of the draft Model Law, while article 57, paragraph 2, should be retained in chapter VI (see A/CN.9/796, para. 101).

### Article 58. Liability

16. The Working Group agreed that article 58 addressed an issue that was normally addressed in general law on liability and should thus be deleted from the draft Model Law.

### Article 59. Judicial or other relief for non-compliance

17. The Working Group agreed that article 59 should be retained as it dealt with the right of the grantor, debtor or other interested person to seek court relief if the secured creditor failed to comply with its obligations either in the context of judicial or extrajudicial enforcement.

### Article 60. Expeditious judicial proceedings

18. It was generally agreed that prolonged enforcement proceedings could have a negative impact on the availability and the cost of credit and that, therefore, the importance of expeditious judicial proceeding should be emphasized. However, differing views were expressed as to how that result could be achieved. One view was that article 60 should be retained in the draft Model Law. It was stated that such an approach would be consistent with the approach taken in recommendation 138 of the Secured Transactions Guide that properly emphasized the importance of expeditious proceedings. It was also observed that the guide to enactment should make reference to recent enactments of secured transactions law that incorporated such expedited proceedings. Moreover, it was suggested that the guide to enactment

could refer even to alternative dispute resolution, including online dispute resolution. That suggestion was objected to. It was pointed out that alternative dispute resolution, including online dispute resolution, were matters that went beyond the mandate given to the Working Group and, in any case, States should be given the flexibility to choose which kind of expeditious proceedings they wished to adopt.

19. However, the prevailing view was that article 60 should be deleted and the matter addressed therein should be addressed in the guide to enactment with examples of expedited proceedings. It was stated that, in its current formulation, article 60 expressed an aspiration rather than a legal rule. It was also observed that the draft Model Law should not interfere with civil procedure law or introduce rules that would be inconsistent with recommendations of the Secured Transactions Guide. As a drafting matter, the suggestion was made that article 60 could be merged with article 59 to establish a general principle of court relief, including in the form of accelerated proceedings. After discussion, the Working Group agreed that article 60 should be deleted and the matter addressed therein should be discussed in the guide to enactment, with examples of expedited proceedings (see also para. 95 below).

**Article 61. Post-default rights of the grantor and the secured creditor and Article 62. Judicial and extrajudicial methods of exercising post-default rights**

20. The Working Group agreed that articles 61 and 62 should be retained with a cross-reference to article 4 on the general standard of conduct (see A/CN.9/WG.VI/WP.59).

**Article 63. Right to take over enforcement**

21. Subject to a revision of its heading to better fit its contents and to replacing the references to "control of enforcement" with the words "takes over enforcement" (as the term "control" was used to refer to a method for achieving third-party effectiveness), the Working Group agreed that article 63 should be retained.

**Article 64. Right of redemption**

22. Subject to clarifying the meaning of the words "until the earlier of" in paragraph 2, the Working Group agreed that article 64 should be retained.

**Article 65. Extinction of the security right after full satisfaction of the secured obligation**

23. The Working Group agreed that article 65 should be retained but moved to the appropriate place in the text (either to the end of chapter VI or to chapter II, possibly article 11).

**Article 66. Secured creditor's right to possession of an encumbered asset**

24. The Working Group agreed that article 66 should be retained.

**Article 67. Extrajudicial obtaining of possession of an encumbered asset**

25. The Working Group agreed that article 67 should be retained with appropriate adjustments to clarify that all three conditions set out therein should be satisfied and the necessary explanations should be given in the guide to enactment consistent with the Secured Transactions Guide (e.g., that while, subpara. (a) required the grantor's positive consent, subpara. (c) referred to the fact of the absence of objection on the part of the grantor to avoid references to technical concepts, such as breach of peace or public order). A note of caution was struck that, whatever drafting technique was adopted in article 67 to clarify that all conditions needed to be met should be equally adopted throughout the draft Model Law.

**Article 68. Extrajudicial disposition of an encumbered asset**

26. Subject to the deletion of the cross-reference in paragraph 2 to the general standard of conduct, which would be applicable throughout the draft Model Law anyway, the Working Group agreed that article 68 should be retained.

**Article 69. Advance notice of extrajudicial disposition of an encumbered asset**

27. A number of suggestions of a drafting nature were made with respect to article 69, including that: (a) the words "or the time and place of disposition" should be inserted in paragraph 3 after the words "disposed of"; (b) the words "in writing" in paragraph 3 should be deleted (as notice was defined in article 2, subpara. (r) as a communication in writing); (c) the words "being enforced" at the end of paragraph 5 should be deleted (as it was not the security agreement, but the security right that was being enforced); and (d) the different uses of the term "notice" should be reviewed with a view to determining whether different terms should be used, such as "registration notice" or "registered notice". Subject to those suggestions, the Working Group agreed that article 69 should be retained.

**Article 70. Distribution of proceeds of disposition of an encumbered asset**

28. The Working Group agreed that article 70 should be retained.

**Article 71. Acquisition of an encumbered asset in satisfaction of the secured obligation**

29. A suggestion was made that article 71 could be elaborated to contemplate the possibility of the secured creditor applying to a court to acquire the encumbered asset if the objection by the grantor was unjustified or abusive. That suggestion was objected to. It was noted that, in line with the approach taken in the Secured Transactions Guide, the grantor should have the freedom to refuse the secured creditor's offer, in which case, the secured creditor might choose to pursue one of its other remedies provided in the draft Model Law (see Secured Transactions Guide, chapter VIII, paras. 67-70). With respect to paragraph 3, the Working Group agreed that it should be aligned more closely with recommendation 157, subparagraph (b), of the Secured Transactions Guide while the additional information requirement currently set out in that paragraph should be retained. With respect to paragraph 5, the Working Group confirmed the understanding that it should be clarified to explain that, in the case of full satisfaction of the secured obligation, it would be

sufficient if each addressee did not object in a timely fashion. Subject to those changes, the Working Group agreed that article 71 should be retained.

**Article 72. Rights acquired through judicial disposition**

30. The Working Group agreed that the words "other officially administered process" in article 72 (and the words "or other authority" in art. 62, para. 1) should be placed within square brackets and the guide to enactment should give examples of such a process, including a process administered by a chamber of commerce or a notary public. It was also agreed that the guide to enactment should provide some guidance with respect to judicial disposition processes (e.g., sale and distribution of encumbered assets supervised by a court). Subject to those changes, the Working Group agreed that article 72 should be retained.

**Article 73. Rights acquired through extrajudicial disposition**

31. The Working Group agreed that the term "good faith" should be used in the draft Model Law only to express an objective standard of conduct (see A/CN.9/WG.VI/WP.59, art. 4, para. 1), while other terminology should be used to express a subjective standard (i.e., knowledge of a fact on the part of a person). As a result, it was agreed that the words "good faith acquirer, lessee or licensee" in paragraph 4 of article 73 should be replaced by wording that would neither require only knowledge of non-compliance with a rule on enforcement nor go as far as to require collusion between the secured creditor and the acquirer.

## C. Chapter VII. Asset-specific rules (A/CN.9/WG.VI/WP.57/Add.3)

### 1. General

32. Differing views were expressed as to the presentation of the asset-specific rules in chapter VII. One view was that all the asset-specific rules should be presented in a single chapter that would come after chapter VI. It was stated that such an approach would allow the reader to have an overview of all the asset-specific rules after having obtained an overview of all the generally applicable rules. Another view was that each part of the asset-specific rules should be presented in a separate chapter that should come before chapter VI. It was stated that such an approach would result in avoiding giving the impression that a State could adopt or leave out of its law all of the asset-specific rules as a whole. It was also observed that such an approach would at the same time, result in presenting all those rules as closely as possible to the chapters dealing with the main issues addressed in the asset-specific rules (i.e., creation, third-party effectiveness and priority). After discussion, the Working Group agreed to defer a decision on the presentation of the asset-specific rules in chapter VII (and the relevant definitions in art. 2 of the draft Model Law) until it had reviewed their substance (see para. 94 below).

### 2. Receivables

33. The Working Group agreed that the section of chapter VII on receivables should follow as closely as possible the relevant recommendations of the Secured Transactions Guide and the respective provisions of the United Nations Assignment

Convention on which those recommendations were based. Noting that several States had already adopted the key principles in the United Nations Assignment Convention, one delegation stated that it was taking steps to ratify the Convention and expressed the hope that other States would also become parties to the Convention.

**Article 74. Anti-assignment clauses**

34. The suggestion was made that article 74 should be placed within square brackets so as to provide more flexibility to States. That suggestion was objected to. It was stated that article 74 reflected a key provision for receivables financing that was included in both the United Nations Assignment Convention (art. 9) and the Secured Transactions Guide (rec. 24). It was also observed that, without such a provision, lending against the security of receivables would become extremely difficult or costly as in a typical transaction lenders would need to check a large number of contracts, which would not be even possible in the case of future receivables. With respect to the bracketed text in paragraph 2 of article 74, the Working Group agreed that it should be retained outside of square brackets. Subject to that change, the Working Group agreed that article 74 should be retained.

**Article 75. Creation of a security right in a personal or property right that secures a receivable**

35. It was agreed that the heading of article 75 (which was based on rec. 25 of the Secured Transactions Guide and art. 10 of the United Nations Assignment Convention) should be revised to better reflect its contents. In addition, it was agreed that the words "a secured creditor ... has the benefit of" in paragraph 1 and "the security right automatically extends to" in paragraph 2 should be retained but explained in the guide to enactment. Moreover, it was agreed that, to avoid repetition, paragraph 4 might be merged with paragraph 1. It was also agreed that the bracketed text in paragraph 5 should be retained outside of square brackets. It was also agreed that the terminology used in article 75 and throughout the section of chapter VII on receivables (e.g., assignor and assignee or grantor and secured creditor) should be reviewed and revised to ensure consistency. Subject to those changes, the Working Group agreed that article 75 should be retained.

**Article 76. Representations of the assignor**

36. The Working Group agreed that article 76 (which was based on rec. 114 of the Secured Transactions Guide and art. 12 of the United Nations Assignment Convention) should be retained.

**Article 77. Right to notify the debtor of the receivable**

37. In response to a question, it was noted that article 77 (which was based on rec. 115 of the Secured Transactions Guide and art. 13 of the United Nations Assignment Convention) dealt with the question of who could notify the debtor of the receivable, the definition of the term "notification of the assignment" in article 2, subparagraph (s), and article 80 dealt with the question of the content of a notification and various articles (e.g., art. 81) dealt with the legal consequences of a notification. It was agreed that the guide to enactment could usefully explain how article 77 and other articles in the section of chapter VII on receivables dealt with

those matters. It was also agreed that the term "notification of the assignment" or "notification of an assignment" should be used consistently in article 77 and in all the relevant articles.

**Article 78. Right of the assignee to payment**

38. The Working Group agreed that article 78 (which was based on rec. 116 of the Secured Transactions Guide and art. 14 of the United Nations Assignment Convention) should be retained.

**Article 79. Protection of the debtor of the receivable**

39. The Working Group agreed that article 79 (which was based on rec. 117 of the Secured Transactions Guide and art. 15 of the United Nations Assignment Convention) should be retained.

**Article 80. Notification of the assignment**

40. Subject to any revision necessary to ensure consistency in the terminology used and any explanation of the relationship between a notification and a payment instruction in the guide to enactment, the Working Group agreed that article 80 (which was based on rec. 118 of the Secured Transactions Guide and art. 16 of the United Nations Assignment Convention) should be retained.

**Article 81. Discharge of the debtor of the receivable by payment**

41. Subject to any revision necessary to ensure consistency in the terminology used, the Working Group agreed that article 81 (which was based on rec. 119 of the Secured Transactions Guide and art. 17 of the United Nations Assignment Convention) should be retained.

**Article 82. Defences and rights of set-off of the debtor of the receivable,**
**Article 83. Agreement not to raise defences or rights of set off,**
**Article 84. Modification of the original contract and**
**Article 85. Recovery of payments made by the debtor of the receivable**

42. The Working Group agreed that articles 82-85 (which were based on recs. 120-123 of the Secured Transactions Guide and arts. 18-21 of the United Nations Assignment Convention) should be retained.

**Article 86. Third-party effectiveness of a security right in a right that secures payment of a receivable**

43. With respect to article 86 (which was based on rec. 48 of the Secured Transactions Guide), the Working Group agreed that, while its substance should be retained, its terminology ("a security right extends") and its placement in the section of chapter VII on receivables should be reviewed.

**Article 87. Application of the chapter on enforcement to an outright transfer of a receivable, Article 88. Enforcement and Article 89. Distribution of proceeds**

44. A number of suggestions were made with respect to articles 87-89 (which were based on recs. 167-169 and 172 of the Secured Transactions Guide). One suggestion

was that articles 87-89 should be moved to the enforcement chapter. Another suggestion was that the relationship between articles 87 and 89, subparagraph (b), should be reviewed as, in the case of an outright assignment, the assignee could retain any surplus. Yet another suggestion was that the heading of article 89 should be revised to better reflect its contents. Yet another suggestion was that the terminology used in those articles should be reviewed for consistency. Yet another suggestion was that the guide to enactment should clarify that payment of any surplus should be made in the order of priority in accordance article 70 of the draft Model Law. While it postponed a decision as to the placement of those articles until it had completed its consideration of the asset-specific provisions, the Working Group agreed that all the other suggestions should be implemented (see para. 94 below).

**Article 90. Law applicable to the relationship between the debtor of the receivable and the assignee**

45. The Working Group agreed that article 90 (which was based on rec. 217 of the Secured Transactions Guide) should be retained. It was also agreed that in the guide to enactment reference should be made to the draft Hague Principles on Choice of Law in International Contracts.

### 3. Negotiable instruments

**Article 91. Rights and obligations of the obligor**

46. The Working Group agreed that article 91 (which was based on rec. 124 of the Secured Transactions Guide) should be retained. It was also agreed that the guide to enactment should clarify that article 91 was intended to preserve the rights of an obligor under the law relating to negotiable instruments.

**Article 92. Priority**

47. The Working Group agreed that, while article 92 (which was based on recs. 101 and 102 of the Secured Transactions Guide) should be retained, paragraph 1 should be aligned more closely with recommendation 101 of the Secured Transactions Guide and the article as a whole should be reviewed for clarity in its treatment of priority among claimants with competing rights in a negotiable instrument. In the discussion, the concern was expressed that, to the extent that article 92 referred only to possession (defined as actual possession in art. 2, subpara. (u)) without any necessary endorsement, it might interfere with the law relating to negotiable instruments. In response, it was noted that article 92 dealt only with priority conflicts, while article 91 was sufficient to preserve the rights of an obligor under the law relating to negotiable instruments. After discussion, the Working Group agreed that article 92 should be retained.

**Article 93. Law applicable to third-party effectiveness in certain cases**

48. The Working Group agreed that article 93 (which was based on rec. 211 of the Secured Transactions Guide) should be retained. The question was raised whether the statement that articles 75, 86, 89 and 90 of the section on receivables also applied to negotiable instruments should be reflected in an article rather than in a footnote. Noting that the same approach was followed with respect to other articles

in chapter VII, the Working Group deferred a decision until it had an opportunity to review the substance of all the articles in chapter II (see para. 94 below).

### 4. Rights to payment of funds credited to a bank account

#### Article 94. Creation

49. The Working Group agreed that article 94 should be aligned more closely with recommendation 26 of the Secured Transactions Guide and retained.

#### Article 95. Rights and obligations of the depositary bank

50. The Working Group noted that article 95 was based on recommendations 26, 125 and 126 of the Secured Transactions Guide. A number of suggestions were made. One suggestion was that the guide to enactment should clarify that the reference to "other law" in paragraph 2 did not inadvertently result in excluding contractual rights of set off of a depositary bank. Another suggestion was that the chapeau of paragraph 3 should be revised to state: "Nothing in this law obligates the depositary bank". It was stated that under other law the depositary bank might be obligated to pay a person other than the account holder or to respond to queries for information with respect to an account. Yet another suggestion was that subparagraph 3 (a), which referred to control, should be deleted. It was stated that the draft Model Law did not obligate the depositary bank to pay anyone, unless there was a control agreement (see subpara. 3 (c)) and a court order. It was also observed that, in the case of a control agreement, the depositary bank would have agreed as a matter of contract law to pay the secured creditor and, in the case of a court order, the depositary bank would have to comply with the court order. Thus, it was pointed out that it was sufficient to provide in subparagraph 3 (c) that the draft Model Law did not obligate a depositary bank to enter into a control agreement or pay any person other than a secured creditor with a control agreement. It was also observed that, with the exception of a secured creditor that had entered into a control agreement, control involved either automatic control upon creation of a security right if the secured creditor was the depositary bank or upon a transfer of the account to the secured creditor. Yet another suggestion was that a definition of "control agreement" should be included in the draft Model Law (see A/CN.9/WG.VI/WP.59, art. 2). Subject to those changes, the Working Group agreed that article 95 should be retained.

#### Article 96. Third-party effectiveness

51. Subject to the inclusion of wording to clarify the circumstances that constituted control, the Working Group agreed that article 96 (which was based on rec. 49 of the Secured Transactions Guide) should be retained.

#### Article 97. Priority

52. The Working Group noted that article 97 was based on recommendations 103-105 of the Secured Transactions Guide. A number of suggestions were made with respect to article 97. One suggestion was that paragraphs 1 and 3 should be aligned more closely with recommendation 103. Another suggestion was that paragraph 5 should clarify that instances in which transfers were "initiated or authorized" by the grantor, persons acting on behalf of

the grantor (e.g. the grantor's insolvency representative) or successors of the grantor were also covered. Subject to those changes, the Working Group agreed that article 97 should be retained.

**Article 98. Enforcement**

53. The Working Group noted that article 98 was based on recommendations 173-175 of the Secured Transactions Guide. It was stated that the reference to the articles dealing with the rights and obligations of the depositary bank in article 98 was superfluous and thus could be deleted. It was widely felt that articles 94 and 95 would in any case apply to any aspect of a security right in a right to payment of funds credited to a bank account, including its enforcement. Subject to that change, the Working Group agreed that article 98 should be retained.

**Article 99. Law applicable**

54. The Working Group noted that article 99 was based on recommendation 210 of the Secured Transactions Guide. Subject to the deletion of the superfluous reference to article 94 in paragraph 1 and to the inclusion of the rule contained in article 5 of the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (the "Hague Securities Convention") in paragraph 3, the Working Group agreed that article 99 should be retained.

**5. Money**

**Article 100. Priority of a security right in money**

55. Noting that article 100 was based on recommendation 106 of the Secured Transactions Guide, the Working Group agreed that article 100 should be retained. A suggestion was made that the wording of paragraph 2 ("this article does not adversely affect") might be used also in the context of article 91 (see para. 46 above).

**6. Negotiable documents and tangible assets covered by a negotiable document**

**Article 101. Extension of a security right in a negotiable document to the tangible asset covered by the negotiable document, Article 102. Rights and obligations of the issuer of a negotiable document and Article 103. Third-party effectiveness**

56. The Working Group agreed that articles 101-103 (which were based on recs. 28, 130 and 51-53 of the Secured Transactions Guide) should be retained.

**Article 104. Priority**

57. Subject to the alignment of paragraphs 2 and 3 of article 104 with recommendation 109 of the Secured Transactions Guide, on which they were based, the Working Group agreed that article 104 should be retained.

**Article 105. Enforcement**

58. The Working Group agreed that article 105, which was based on recommendation 177 of the Secured Transactions Guide, should be retained.

## 7. Intellectual property

### Article 106. Security rights in tangible assets with respect to which intellectual property is used

59. The Working Group noted that article 106 was based on recommendation 243 of the Intellectual Property Supplement. The concern was expressed that, in its current formulation, article 106 did not reflect a legal rule suitable for a model law. It was thus suggested that article 106 should be either moved to the guide to enactment or revised. The concern was also expressed that the expression "a tangible asset with respect to which intellectual property is used" was not sufficiently clear and should be explained. Subject to those changes, the Working Group agreed that article 106 should be retained.

### Article 107. Impact of a transfer of encumbered intellectual property on the effectiveness of the registration

60. The Working Group noted that article 107 was based on recommendation 244 of the Intellectual Property Supplement. A number of suggestions were made. One suggestion was that it should be clarified that, according to article 54 of the draft Model Law, a security right made effective against third parties by registration of a notice in an intellectual property registry had priority over a security right made effective against third parties by registration of a notice in the general security rights registry. It was also suggested that the guide to enactment should clarify that, in any case, as a result of article 1, subparagraph 3 (c) (see A/CN.9/WG.VI/WP.59), the draft Model Law would not apply to security rights in intellectual property in so far as the draft Model Law was inconsistent with law relating to intellectual property. Subject to those changes or clarifications, the Working Group agreed that article 107 should be retained.

### Article 108. Priority of rights of certain licensees of intellectual property

61. The Working Group noted that article 108 was based on recommendation 245 of the Intellectual Property Supplement. The suggestion was made that the guide to enactment should clarify the meaning of the "ordinary course of business" concept, which was unknown in an intellectual property context, by making appropriate references to the Intellectual Property Supplement. Subject to that clarification, the Working Group agreed that article 108 should be retained.

### Article 109. Right of the secured creditor to preserve the encumbered intellectual property

62. The Working Group was noted that article 109 was based on recommendation 246 of the Intellectual Property Supplement. As a matter of drafting, it was suggested that the word "may" should be replaced by words along the following lines: "have the power to". The Working Group agreed that article 109 should be retained.

### Article 110. Application of acquisition security right provisions to security rights in intellectual property

63. The Working Group noted that article 110 was based on recommendation 247 of the Intellectual Property Supplement. It was suggested that the guide to

enactment should clarify the reference to the notion of "ordinary course of business sale" in subparagraph 2(a)(i) of article 110, which was unknown in an intellectual property context, by making appropriate references to the Intellectual Property Supplement. Subject to that clarification, the Working Group agreed that article 110 should be retained.

**Article 111. Law applicable to a security right in intellectual property**

64. Noting that article 111 was based on recommendation 248 of the Intellectual Property Supplement, the Working Group agreed that it should be retained.

65. At the conclusion of its discussion of articles 106-111 on intellectual property, the Working Group agreed that those articles dealt with an extremely important type of asset in a balanced way that was consistent with the Intellectual Property Supplement and should thus be retained in the draft Model Law outside square brackets.

## D. Chapter VIII. Transition (A/CN.9/WG.VI/WP.57/Add.3)

66. The Working Group agreed that the transition rules of the draft Model Law should include rules that would sufficiently address a situation in which a State moved from one registration system to another and a situation in which a State moved from no registration system to a registration system. As to whether rules should be included to address situations that involved a change in the applicable law, the Working Group agreed to defer a decision until it had an opportunity to consider the conflict-of-laws provisions of the draft Model Law.

**Article 112. General**

67. The Working Group noted that article 112 was based on recommendation 228 of the Secured Transactions Guide. A number of suggestions were made, including that: (a) a general provision should be inserted to deal with the relationship between the new law and other laws to be specified by the enacting State that would be abrogated by the new law; (b) the definition of the term "effective date" in subparagraph 2 (b) should be deleted and replaced with the words "date on which this Law enters into force"; (c) "prior security right" should be defined as a right created by agreement or other transaction concluded before the effective date of the law without any reference to a "security" agreement, since an agreement might not be considered a security agreement under prior law; and (d) paragraph 4 could be deleted as it stated the obvious. Subject to those changes, the Working Group agreed that article 112 should be retained.

**Article 113. Actions commenced before the effective date**

68. The Working Group noted that article 113 was based on recommendation 229 of the Secured Transactions Guide. Subject to any revision necessary to clarify in subparagraph (b) what constituted commencement of enforcement which involved several stages (i.e. notice of default, repossession, sale and allocation of proceeds), the Working Group agreed that article 113 should be retained.

**Article 114. Creation of a security right**

69. The suggestion was made that article 114 should be aligned more closely with recommendation 230 of the Secured Transactions Guide, on which it was based, so as to clarify in particular that the prior law would determine whether a security right was created before the date the new law entered into force. The suggestion was also made that reference should be made to a security right being "effective as between the parties" to avoid a misunderstanding that what was meant was that the security right was "effective" or "opposable" against third parties. Subject to those changes, the Working Group agreed that article 114 should be retained.

**Article 115. Third-party effectiveness of a security right**

70. The Working Group noted that article 115 was based on recommendation 231 of the Secured Transactions Guide. The suggestion was made that article 115 should clarify that a security agreement was sufficient as authorization for registration under the new law (see A/CN.9/WG.VI/WP.59/Add.1, art. 24, para. 3) even if that was not the case under the prior law. The suggestion was also made that paragraph 2 should be revised to provide that "a security right continued to be effective" and paragraph 3 should be deleted as superfluous. Subject to those changes, the Working Group agreed that article 115 should be retained.

**Article 116. Priority of a security right**

71. The Working Group noted that article 116 was based on recommendations 232-234 of the Secured Transactions Guide. Subject to the clarification that paragraph 3 of article 116 set out an exclusive list of instances that constituted a change in the priority status of a security right, the Working Group agreed that article 116 should be retained.

## E. Non-intermediated securities

72. The Working Group noted that the Commission, at its forty-sixth session, in 2013, had agreed that whether the draft Model Law should address security interests in non-intermediated securities would be assessed at a future time (see A/68/17, para. 332). Accordingly, the Working Group engaged in a discussion about non-intermediated securities, noting that security interests in non-intermediated securities were not addressed in the Unidroit Convention on Substantive Rules for Intermediated Securities (the "Unidroit Securities Convention"), the Hague Securities Convention or Secured Transactions Guide.

73. Noting that non-intermediated securities (e.g. shares and bonds) were regularly used in commercial finance transactions as security, in particular by small- and medium-size enterprises, the Working Group engaged in a discussion of asset-specific rules that could apply to security rights in non-intermediated securities. The Working Group first considered the following definitions:

(a) "Securities" means any shares, bonds or other financial instruments or financial assets [(other than cash)] [other than money, receivables or [any other type of asset to be excluded by the enacting State]];

(b) "Intermediated securities" means securities credited to a securities account or rights or interests in securities resulting from the credit of securities to a securities account;

(c) "Non-intermediated securities" means securities other than intermediated securities;

(d) "Certificated non-intermediated securities" means non-intermediated securities represented by a [paper] certificate that:

(i) Expressly states that the person entitled to the securities is the person in physical possession of the certificate ("bearer securities") [or otherwise states that the securities are bearer securities]; or

(ii) Expressly identifies the person entitled to the securities [and is transferable by registration of the securities in the name of the transferee in the books maintained for that purpose by or on behalf of the issuer ("securities in registrable form")];

(e) "Dematerialized non-intermediated securities" means non-intermediated securities not represented by a paper certificate that are transferable by registration of the securities in the name of the transferee in the books maintained for that purpose by or on behalf of the issuer;

(f) "Control" with respect to dematerialized non-intermediated securities exists if a control agreement has been concluded among the issuer, the grantor and the secured creditor; and

(g) "Control agreement" means an agreement among the issuer of non-intermediated securities, the grantor and the secured creditor, evidenced by a signed writing, according to which the issuer has agreed to follow instructions from the secured creditor with respect to the securities to which the agreement relates without further consent from the grantor [and is not permitted to follow the instructions of the grantor with respect to those securities without the consent of the secured creditor].

74. With respect to the definition of the term "securities", it was widely felt that it was overly broad and could thus result in subjecting receivables and negotiable instruments to the rules applicable to securities. After discussion, the Working Group agreed that the definition of the term "securities" should provide general guidance by referring to debt and equity instruments (i.e. shares of companies, including partnerships and limited liability companies, and both private and public bonds), while leaving it to each enacting State to set out to complete the definition according to its law.

75. With respect to the definitions of the terms "intermediated securities", "non-intermediated securities" and "dematerialized non-intermediated securities", it was agreed that they should be retained in their present formulation for further consideration.

76. With respect to the definition of "certificated non-intermediated securities", it was agreed that the word "paper" should be retained outside square brackets, subparagraph (d)(i) should follow a functional approach and thus be revised to refer to the terms of the certificate, and the bracketed text in subparagraph (d)(ii) should be retained outside square brackets.

77. With respect to the definition of the term "control", it was agreed that, for reasons of clarity and efficiency, it should be deleted and the relevant articles should refer directly to the term "control agreement".

78. With respect to the definition of the term "control agreement", it was agreed that the bracketed text referring to negative control on the part of the secured creditor was unnecessary as it was covered by the reference to positive control by way of a control agreement and should thus be deleted.

79. Subject to the above-mentioned changes (see paras. 74-78 above), the Working Group agreed that the above-mentioned definitions should be retained and explained in the guide to enactment.

80. The Working Group next turned to the question whether outright transfers of non-intermediated securities should be covered in the draft Model Law. After discussion, it was agreed that outright transfers of non-intermediated securities should not be covered as, unlike outright transfers of receivables, outright transfers of non-intermediated securities were not part of significant financing practices, and, in any case, would be subject to securities law.

81. However, it was agreed that a priority conflict between a security right in, and the right of a transferee of, non-intermediated securities should be addressed. As to how that matter should be addressed, a number of suggestions were made. One suggestion was that the general priority rule contained in article 47 (see A/CN.9/WG.VI/WP.57/Add.2) should apply. It was noted that application of article 47 would result in a transferee of non-intermediated securities taking the securities subject to a security right that was effective against third parties. Another suggestion was that a rule along the lines of article 100 (see A/CN.9/WG.VI/WP.57/Add.3) should be added to provide that: (a) a transferee of non-intermediated securities would take them free of a security right, unless the transferee had knowledge that the transfer violated the rights of the secured creditor under the security agreement; and (b) that provision did not adversely affect the rights of holder of securities under other law. Yet another suggestion was that a rule along the lines of article 104 (see A/CN.9/WG.VI/WP.57/Add.3) could accommodate both the recognition of the general priority rule and the need for an exception to that general rule where the rights of transferee were protected under other law.

82. In response to a question, the Working Group confirmed that the partial override of anti-assignment clauses provided in article 74 (see A/CN.9/WG.VI/WP.57/Add.3) applied only to receivables (and not to non-intermediated securities or any other types of asset). In that connection, the Working Group also agreed that the draft Model Law should not override statutory limitations to the creation or enforcement of a security right, or to the transferability of specific types of asset, and thus should include a provision along the lines of recommendation 18 of the Secured Transactions Guide.

83. The Working Group next turned to discuss a number of articles on non-intermediated securities.

84. With respect to third-party effectiveness of a security right in non-intermediated securities, the Working Group considered the following article:

"**Article 112. Third-party effectiveness**

"1. A security right in certificated non-intermediated securities is made effective against third parties by delivery of the certificate to the secured creditor [and, if the certificate is not in bearer form, endorsement of the certificate in favour of the secured creditor,] or by registration of a notice with respect to the security right in the general security rights registry.

"2. A security right in dematerialized non-intermediated securities is made effective against third parties by registration of a notice with respect to the security right in the general security rights registry, by registration of the securities in the name of the secured creditor in the issuer's books, or by control."

85. The Working Group agreed that the bracketed text in paragraph 1 should be deleted. It was widely felt that, while endorsement might be a condition for the transfer of non-intermediated securities under other law, it did not need to be made a condition for achieving third-party effectiveness. The suggestion was made that registration in the books of the issuer should also be included in paragraph 1 as an additional method for achieving third-party effectiveness. There was no support for that suggestion. It was widely felt that, in the case of a typical transaction, a secured creditor would either obtain possession of the certificate or register a notice in the general security rights registry. While the view was expressed that, with the above-mentioned changes, paragraph 1 reiterated the general third-party effectiveness rule of article 13 (see A/CN.9/WG.VI/WP.59) and might not be necessary, the Working Group agreed that it should be retained for further consideration.

86. With respect to paragraph 2, it was agreed that reference should be made to a "control agreement" rather than to control (see para. 5 above) and to the "books maintained for that purpose by or on behalf of the issuer" rather than to "the books of the issuer" (see definition (d)(ii) in para. 73 above). It was also agreed that the text of paragraph 2 should be revised to ensure that it was sufficient to make a notation about the security right in the issuer's books and that it was not necessary to register the securities in the name of the secured creditor as if the secured creditor were a transferee.

87. Subject to the above-mentioned changes (see paras. 85 and 86 above), the Working Group agreed that article 112 should be retained.

88. With respect to priority, the Working Group considered the following article:

"**Article 113. Priority**

"1. A security right in certificated non-intermediated securities made effective against third parties by delivery of the certificate to the secured creditor [with any necessary endorsement] has priority over a security right in the same securities made effective against third parties by registration of a notice with respect to the security right in the general security rights registry.

"2. A security right in dematerialized non-intermediated securities made effective against third parties by control has priority over a security right in the same securities made effective against third parties by registration of a notice with respect to the security right in the general security rights registry.

"3. A security right in dematerialized non-intermediated securities made effective against third parties by registration of the securities in the name of the secured creditor in the issuer's books has priority over a security right in the same securities made effective against third parties by control or by registration of a notice with respect to the security right in the general security rights registry."

89. It was agreed that in paragraph 1 the reference to endorsement should be deleted (see para. 85 above), in paragraphs 2 and 3 reference should be made to the control agreement (see paras. 77 and 86 above) and in paragraph 3 reference should be made to a notation in the books maintained for that purpose by or on behalf of the issuer (see para. 86 above).

90. With respect to the law applicable, the Working Group considered the following article:

"**Article 114. Law Applicable**

"1. The law applicable to the effectiveness of a security right in certificated non-intermediated securities as against the issuer is the law of the State under which the issuer is constituted[, unless the issuer has chosen the law of another State, in which case the law of the State chosen by the issuer is the applicable law].

"2. The law applicable to the creation, third-party effectiveness and priority of a security right in certificated non-intermediated securities is the law of the State in which the certificate is located.

"3. The law applicable to the enforcement of a security right in certificated non-intermediated securities is the law of the State in which enforcement takes place.

"4. The law applicable to the effectiveness against the issuer, the creation, the effectiveness against third parties, the priority and the enforcement of a security right in dematerialized non-intermediated securities is the law of the State under which the issuer is constituted."

91. It was agreed that the bracketed text in paragraph 1 should be deleted. It was widely felt that referring to the law chosen by the issuer would create uncertainty as it would be extremely difficult for prospective secured creditors to know whether the issuer had chosen another law and, if so, which one. In addition, it was agreed that the formulation of paragraph 1 might need to be revised to address issuers that were public entities. In addition, it was agreed that, with respect to the relevant time for determining the location of the certificate or the issuer, reference should be made in the guide to enactment to article 7 of Annex II (see A/CN.9/WG.VI/WP.57/Add.4). Moreover, it was agreed that the guide to enactment should discuss coordination of the draft model provisions with securities law. Subject to those changes, the Working Group agreed that article 114 should be retained.

92. In the discussion, one delegation stated that it could not take a position on whether the draft Model Law should address security rights in non-intermediated securities before considering the relationship between the draft Model Law and the European Union Collateral Directive (2002/47/EC), as amended by

Directive 2009/44/EC. In response, another delegation observed that security rights in non-intermediated securities should be addressed in the draft Model Law, in particular in view of their importance as security for credit to small- and medium-size enterprises. It was also pointed out that, in any case, a regional approach should not dictate the approach to be followed at the international level.

93. After discussion, the Working Group decided to make a recommendation to the Commission that the draft Model Law should address security rights in non-intermediated securities along the lines mentioned above. Subject to the Commission's decision, the Working Group noted that articles 112-114 as revised should be included in the draft Model Law.

94. Having concluded its deliberations on all asset-specific rules, the Working Group agreed that they should be placed in an asset-specific section in each of the relevant chapters of the draft Model Law. It was widely felt that such an approach would result in preserving the flexibility of each State to adopt those asset-specific articles it needed, while presenting those articles in the appropriate substantive context. The Working Group also agreed that efforts should be made so that the articles on receivables would use generic secured transaction terminology (e.g. grantor, secured creditor, creation of a security right) instead of terms specific to receivables (e.g. assignor, assignee, assignment of a receivable).

95. In the discussion, the Working Group considered a suggestion to reinsert in the draft Model Law a revised version of article 60, which it had decided to delete (see para. 19 above). The following text was proposed: "Where the secured creditor, the grantor or any other person that owes performance of the secured obligation, or claims to have a right in an encumbered asset, applies to a court or other judicial authority with respect to the exercise of post-default rights, the proceedings should be conducted by way of summary judicial proceedings or alternative official or officially recognized dispute resolution mechanisms to be established or determined by the enacting State". While it was widely felt that that expeditious judicial proceedings were extremely important for a modern secured transactions law, differing views were expressed as to where such a provision should be placed, particularly in view of the fact the civil procedure law differed from State to State and did not lend itself to unification. One view was that such a provision should be retained in the draft Model Law (within square brackets) to emphasize the importance of summary, official or officially administered (e.g. by a notary public or a chamber of commerce) dispute resolution mechanisms. Another view was that, while such a provision that expressed a recommendation and did not provide for a specific proceeding had no place in a model law, it could usefully be included in the guide to enactment. After discussion, the Working Group did not reach a decision with respect to the suggestion to reinsert in the draft Model Law a revised version of article 60 (see para. 19 above).

## F. Annex I. Acquisition financing (A/CN.9/WG.VI/WP.57/Add.4)

96. Noting that rules on acquisition financing were an integral and necessary part of a modern secured transactions law, the Working Group agreed that the articles on acquisition financing should be part of the draft Model Law rather than of an annex. For reasons of clarity, simplicity and efficiency, the Working Group also agreed that

it was sufficient to implement the unitary approach to acquisition financing. It was stated that States that wanted to implement the non-unitary approach would find sufficient guidance in the Secured Transactions Guide. After discussion, the Working Group agreed to incorporate into the draft Model Law only the articles relating to the unitary approach to acquisition financing. It was further agreed that, to follow a more reader-friendly approach, those articles should be placed in the relevant chapters on third-party effectiveness and priority.

97. The Working Group next considered the definitions of the terms "acquisition secured creditor" and "acquisition security right" (see A/CN.9/WG.VI/WP.57/Add.4) and agreed that, with the exception of the clarification that the term security right included an acquisition security right that was superfluous, they should be included in article 2 of the draft Model Law (see A/CN.9/WG.VI/WP.59).

**Article 1. Third-party effectiveness of an acquisition security right in consumer goods and Article 2. Priority of an acquisition security right**

98. With respect to articles 1 and 2, a number of suggestions were made, including that: (a) the guide to enactment should clarify the relationship between article 1 (based on rec. 179 of the Secured Transactions Guide) and article 54 (priority of a security right registered in a specialized registry); and (b) article 2 should be revised to ensure consistent use of terminology, and in subparagraph (c) of alternative A refer to the receipt rule. Subject to those changes, the Working Group agreed that articles 1 and 2 should be retained.

**Article 3. Priority among acquisition security rights**

99. Recalling its decision to include only the unitary approach in the draft Model Law (see para. 96 above), the Working Group agreed that article 3, paragraph 2, and other articles of the draft Model Law should not make any reference to the terminology used in the non-unitary approach. In that context, it was agreed that the definitions of the terms "acquisition secured creditor" and "acquisition security right" should be revised accordingly. It was also agreed that article 3, paragraph 2 (based on recommendation 182 of the Secured Transactions Guide), should refer to "seller" and "lessor".

**Article 4. Priority of an acquisition security right as against the right of a judgement creditor**

100. With respect to article 4, it was agreed that it should be aligned more closely with recommendation 183 of the Secured Transactions Guide.

**Article 5. Priority of an acquisition security right in proceeds of a tangible asset**

101. With respect to article 5, it was agreed that it should be aligned more closely with recommendation 185 of the Secured Transactions Guide.

102. At the end of the discussion on acquisition financing, one delegation expressed the concern that the Working Group's decision not to include the non-unitary approach articles in the draft Model Law might go beyond the mandate given to the Working Group by the Commission to prepare a simple, short and concise model

law based on the recommendations of the Secured Transactions Guide and consistent with all texts of UNCITRAL (see paras. 1 and 3 above).

## G. Annex II. Conflict of laws (A/CN.9/WG.VI/WP.57/Add.4)

103. The Working Group agreed that the articles on conflict of laws were an integral part of a modern secured transactions law and should thus be incorporated in the draft Model Law as a separate chapter. It was also agreed that, in view of the different legislative approaches taken by States, an explanation should be included at the beginning of the chapter that it was up to each State to implement it as part of its secured transactions law or as part of another law.

104. With respect to article 2, paragraph 4, it was agreed that it should be aligned more closely with recommendation 206 of the Secured Transactions Guide.

105. With respect to article 4, subparagraph (a), it was agreed that the guide to enactment should clarify the meaning of the term "enforcement", as that term included several acts that might take place in different States.

106. With respect to articles 8 and 9, it was agreed that they should be aligned more closely with the formulation used in UNCITRAL and other international texts, such as the draft Hague Principles on the Choice of Law in International Contracts.

107. With respect to article 10, paragraph 2, it was agreed that it should be aligned more closely with the formulation of recommendation 31 of the UNCITRAL Legislative Guide on Insolvency Law.

108. With respect to article 11, which was based on recommendation 207 of the Secured Transactions Guide, it was agreed that it should be recast to clarify that its purpose was to relieve the secured creditor from having to register within a short period of time both in the State of origin and in the State of destination.

## H. Chapter I. Scope of application and general provisions (A/CN.9/WG.VI/WP.59)

109. Recalling its decisions to include the articles on intellectual property and non-intermediated securities in the draft Model Law (see paras. 65 and 93 above), the Working Group agreed that the square brackets in article 1, subparagraph 3 (c), and, subject to the decision of the Commission, in article 1, subparagraph 3 (d), should be removed.

110. With respect to article 1, subparagraph 3 (g), it was agreed that it should be revised to clarify that proceeds of an excluded type of asset were excluded as proceeds but not as original encumbered assets, if they fell within the scope of the draft Model Law.